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IN THE

Supreme Court of the United States

NO. 25 OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA, THE STEUBENVILLE, EAST LIVERPOOL AND BEAVER VALLEY TRACTION COMPANY, and INTERSTATE COMMERCE COMMISSION, Appellants,

vs.

THE CITY OF WELLSVILLE, OHIO.

BRIEF OF HARRY BROKAW, AMICUS CURIAE FOR THE CITY OF EAST LIVERPOOL, OHIO.

Appeal From the District Court of the United States for the Northern District of Ohio.

HARRY BROKAW,
City Solicitor for the City of East Liverpool, Ohio.

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NO. 229 OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA, THE STEUBENVILLE, EAST LIVERPOOL AND BEAVER VALLEY TRACTION COMPANY, and INTERSTATE COMMERCE COMMISSION, Appellants,

vs.

THE CITY OF WELLSVILLE, OHIO.

Appeal From the District Court of the United States for the Northern District of Ohio.

Statement.

An order was made by the Interstate Commerce Commission, on behalf of the Steubenville, East Liverpool and Beaver Valley Traction Company.

The order is (Tr. Page 15). This order in effect directed an increase of fares on the lines of said Company, The Steubenville, East Liverpool and Beaver

Valley Traction Company, from the Ohio Pennsylvania State line to Steubenville, Ohio. The said order placed in effect would have relieved the authorities of the State of Ohio of jurisdiction over the said lines.

Before the going into effect of said order, the City of Wellsville, the appellee herein instituted an action in the District Court in and for the Northern District of Ohio seeking a preliminary injunction, which injunction was granted and upon final hearing was made permanent. It is from this order that the appeal has been taken and the case is now in this Court.

On page 33 of the Transcript, the District Court in its finding says: "The general situation is correctly set forth in the report of the Interstate Commerce Commission, and need not be repeated here. The defendant railway, upon the facts as found is a street and interurban electric passenger railway and is not engaged in the general business of transporting freight in addition to its passenger and express business, nor is it operated as a part of a general steam railroad system of transportation, nor in the general transportation of freight. The amount of freight business done by it is proportionately less, and relatively more unimportant than in the Village of Hubbard case. In the Company's annual report its gross receipts from these freight earnings are reported under *Express* earnings. The Company is not in our opinion subject to the jurisdiction and regulation of the Interstate Commerce Commission for the reasons set forth in the Village of Hubbard case."

It will be noted here that the finding of the Interstate Commerce Commission was by a divided Court

four to five (Tr. Page 15), four of the Commissioners dissenting, and that the opinion of the District Court was the unanimous decision of the three Judges.

The opinion (Tr. 33) *City of Wellsville vs. The United States*, 278 Fed. Rep., 769 adopts and follows the opinion in the Village of *Hubbard vs. The United States*, 278 Fed. Rep., 754 and the precedents cited in the Hubbard opinion of the Court apply with equal force here.

Points.

1. The Steubenville, East Liverpool and Beaver Valley Traction Company, is not subject to the Interstate Commerce Acts and the commission is without jurisidiction to make an order.

2. The freight business is negligible and a subterfuge to get within the jurisdiction of the Commission.

3. The Franchise Contracts of the Cities of Wellsville and East Liverpool, Ohio, with the Steubenville, East Liverpool and Beaver Valley Traction Company, are valid and binding.

4. The City of Wellsville has interest to maintain the bill.

5. There is no unjust discrimination such as would warrant the action of the Commission.

General Argument.

POINT 1.

JURISDICTION OF COMMISSION.

The "Transportation Act of 1920" does not give jurisdiction to the Commission over street, suburban or interurban railway fares, rates and charges such as are involved in this proceeding and to further support this contention, attention is called to the following parts of the "Act to Regulate Commerce, as amended by the Transportation Act of 1920."

Section 15—Paragraph 3:

> "The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare or charge, between street electric passenger railways not engaged in the general business of transporting freight, in addition to their passenger and express business."

Also, in Section 15-A (Added February 28th, 1920, of the Interstate Commerce Commission Act). In the exception set forth in which this Act shall not apply, under subdivision "B" the following language appears

> "Street or suburban electric railways, unless operated as a part of a general steam railroad system of transportation."

And under "C" of the same section, the following exceptions appear:

> "Interurban railways unless operated as a part

of a general steam railroad system of transportation, or engaged in the general transportation of freight."

Section 439. The Interstate Commerce Act is further amended by inserting therein a new section between Section 20 and Section 21, to be designated Section 20 a, and to read as follows:

"Section 20-a (1). That as used in this section the term 'carrier' means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act."

The language of the parts above set forth clearly indicate to what extent the Interstate Commerce Commission has jurisdiction over street railways so far as the Cities of Steubenville, East Liverpool and Wellsville are concerned.

The District Court bases its decision largely on the case of *Omaha Street Railway vs. Interstate Commerce Commission*, 230 U. S., 324.

In the *Omaha case* the Court brings out the distinction between a Street Railway and an ordinary Railway, such as within the power and jurisdiction of the Commission. That case is a distinct landmark in so far as this question is concerned. Prior to this decision the Commission had taken jurisdiction in numer-

ous Street Railway cases, but was compelled by the decision to adopt a different course.

At page 338 in the opinion the Court says:

> "The Company used such cars and did a street passenger business only. It laid its tracks in crowded thoroughfares of those cities and their suburbs and it is manifest that Congress did not intend that these tracks should be connected with railroads for hauling freight cars and long trains along the streets of Omaha and Council Bluffs"

The Court pointed out and distinguished the characteristics of ordinary railroads as distinguished from Street Railroads at page 336.

> "The Commerce to which Congress referred was that carried on by Railroads engaged in the hauling of passengers and freight, between States, between States and Territories and between the United States and Foreign Countries * * *. The Act referred to Railroads which were required to post their schedules, not at street corners where passengers board cars, but in every depot, and station or office where passengers are received for transportation."

We think this Omaha case absolutely determines this matter unless there has been some recent change in the law such as the transportation act which would take the matter without the pale of the Omaha case. But in examining the transportation act of 1920 we find that Congress has been very zealous and has spared no opportunity to make the matter plain by preserving many exceptions in regard to Street Railways.

Transportation Act of 1920, Sec. 422, par. (1) reads as follows:

> "The term 'carrier' means a carrier by Railroad, or partly by Railroad and partly by water within the continental United States subject to this act, *excluding* (a) sleeping car companies and express companies, (b) STREET OR SUBURBAN ELECTRIC RAILWAYS UNLESS OPERATED AS A PART OF A GENERAL STEAM RAILROAD SYSTEM OF TRANSPORTATION, (c) INTERURBAN ELECTRIC RAILWAYS UNLESS OPERATED AS A PART OF A GENERAL STEAM RAILROAD SYSTEM OF TRANSPORTATION, OR ENGAGED IN THE GENERAL TRANSPORTATION OF FREIGHT."

Transportation act of 1920, Section 402, Par. 22.

The authority of the Commission conferred by paragraphs 18 to 21, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one state, OR OF STREET SUBURBAN OR INTERURBAN ELECTRIC RAILWAYS WHICH ARE NOT OPERATED AS A PART OR PARTS OF A GENERAL STEAM RAILROAD SYSTEM OF TANSPORTATION.

Transportation act of 1920, Sec. 439, which added the new section 20-a.

That as used in the section the term 'carrier' means a common carrier by railroad, (EXCEPT A STREET, SUBURBAN OR INTERURBAN ELECTRIC RAIL-

WAY NOT OPERATED AS A PART OF A GENERAL STEAM RAILROAD SYSTEM OF TRANSPORTATION).

Transportation Act of 1920, Sec. 209, Par. (a).

The term "carrier" means (1) a carrier by railroad or partly by railroad and partly by water, whose railroad system of transportation is under Federal control at the time Federal control terminates or which has heretofore engaged as a common carrier in general transportation and competed for traffic or connected with a railroad under Federal control; and (2) a sleeping car company whose system of transportation is under Federal control at the time Federal control terminates; BUT DOES NOT INCLUDE A STREET OR INTERURBAN ELECTRIC RAILWAY NOT UNDER THE FEDERAL CONTROL AT THE TIME FEDERA CONTROL TERMINATES, WHICH HAS AS ITS PRINCIPAL SOURCE OF OPERATING REVENUE URBAN, SUBURBAN OR INTERURBAN PASSENGER TRAFFIC OR SALE OF POWER HEAT AND LIGHT OR BOTH.

The principal source of revenue of The Steubenville East Liverpool and Beaver Valley Traction Company must be urban, suburban or interurban passenger traffic, for in their annual report under the head of express we find a freight earning of $14,864.79 for 1919 and $23,018.09 for 1920 (Transcript Page 13) while the annual report for the year 1920 shows a carriage of 10,720,707 passengers. Does this leave any doubt that

the *principal* source of operating revenue is from urban, suburban or interurban passenger traffic?

Transportation Act of 1920, Sec. 300.

Par. 1.

The term "carrier" includes any express company, sleeping car company, and any carrier by railroad, subject to the Interstate Commerce Act, EXCEPT A STREET, INTERURBAN OR SUBURBAN ELECTRIC RAILWAY NOT OPERATING AS A PART OF A GENERAL STEAM RAILROAD SYSTEM OF TRANSPORTATION.

In view of the fact that Congress has made so many exceptions, in the transportation act of 1920, of street, suburban or interurban lines it would seem that it did not intend to include them unless they were a definite part of some stead railroad system or engaged in the general transportation of freight.

The District Court found distincely in this case that The Steubenville, East Liverpool and Beaver Valley Traction Company was neither a part of a steam railroad system of transportation nor engaged in the general transportation of freight.

A very careful distinction has been observed in the law between a street railway or an interurban railway and a railroad. And this distinction has been very clearly marked in Ohio law. In re: *Aron Beach and Southern Railway*, 16 Ohio Dec. (N. P.), 87. Judge Washburn points out the Statutory distinction and on page 94 of his opinion says: "The legislature has been careful to keep the laws in reference to each (street

railroads and steam railroads) separate and distinct; and has enacted, that whatever their Charters are, they shall be judged as to what they really are, for purposes of taxation, by the manner of their construction and operation, and the character of the business they engage in."

As to the construction of this transportation act of 1920 and other sections of the Interstate Commerce Act we wish to quote from *Illinois Central Railroad Company vs. The Public Utilities Commission,* 245 United States, 493:

> "In construing a federal statute enacted under the power conferred by the Commerce Clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of the State, even where that may be done unless and except so far as its purpose to do so is clearly manifested. This being true of an Act of Congress, it is obvious that an order of a subordinate agency such as the Commission should not be given precedence over a State rate Statute otherwise valid unless it conforms to a high standard of certainty."

It seems that there has been no intention of Congress to take charge of a road like this, but upon the other hand Congress has been exceedingly careful to bring such roads within the exception. This case does not furnish a high standard of certainty.

It seems to us that the District Court reaches the gist of the matter of jurisdiction on page 43 of the transcript when it says: "Despite these differences in

phraseology, there is a marked similarity in the characteristics attributed to street electric railways which include them within the jurisdction of the commission. These characteristics are (a) being operated as a part or parts of a general steam railroad system of transportation; (b) engaged in the general business of transporting freight in addition to their passenger and express business; (c) having as its principal source of operating revenue, urban, suburban, or interurban passenger traffic or sale of power, heat and light, or both. In varied instances street electric railways, whether urban, suburban, or interurban, which do not have these characteristics, are excluded from the jurisdiction of the commission. If they have these characteristics, obviously they would be under the jurisdiction of the commission. This being true, does it not follow that defendant's railway, even though an interurban electric railway engaged in the interstate transportation of passengers, must be regarded as outside the jurisdiction and control of the commission unless it possesses one or more of these distinguishing characteristics."

Plainly and admittedly the defendant railway was not operated as part of a general system of steam railroad. We think this has never been seriously contended by the appellants.

THE AMOUNT OF FREIGHT BUSINESS NEGLIGIBLE AND SUBTERFUGE TO GET WITHIN THE JURISDICTON OF THE COMMISSION.

As to the amount of freight carried by the road we quote from Judge Westenhaver's opinion (Tr., page 33):

> "The amount of freight business done by it is proportionately less, and relatively more unimportant than in the Village of Hubbard Case. In the Company's annual report its gross receipts from these freight earnings are reported under *express* earnings."

In the Hubbard Case (Tr. 37) the District Court sums up the amount of revenues from freight and passenger traffic, compares them, and says that the freight is less than seven per cent (7%) of the total revenue. But in this case the percentage of freight is much lower than in the Hubbard Case.

The annual reports of the Traction Company for the years 1918, 1919 and 1920, may be found in tabulated form on page 12 of the transcript. This table contained in the findings of the commission shows the total gross income of the Company to be $840,600.62 for the year 1919 and $949,171.49 for the year 1920. Not included in this table but set out on the following page (Transcript page 13) we find that the gross freight earnings, (always taking into account that they are listed under the head of express) for the year 1919 are $14,864.79 and for 1920, $23,018.09. By a simple process of calculation we find that the freight carried by

The Steubenville East Liverpool and Beaver Valley Traction Company in 1919—is .018% one and eight tenths per cent of the total revenue and in 1920 it is .025% about two and one half per cent of the total revenues. So figured on this basis we find that the amount of freight is *very much less* and relatively more unimportant than in the Hubbard Case.

In showing the relative amount of freight and passenger traffic in the Company's report (Tr. 13) it should be noted that net passenger receipts are given and all expenses are charged against passenger receipts while nothing is charged against freight. Then too the amount of freight is charged as express and it would seem possible that at least a part of this is actually express which would still further reduce the percentage.

If a Company can carry over ten million (10,000,000) passengers and so little freight as to merit no separate listing in its annual report except under the head of express, we think the District Court is right when it says that the road is not engaged in the general business of transporting freight. See (Tr. Page 33).

It is contended by the appellant that the Interstate Commerce Commission gets jurisdiction through the handling of freight, admittedly in small quantities over the lines in question and the argument is advanced that any amount of freight however small takes it out of the limitation of the statute and that the word general has no connection with volume. But we think this contention is not sound.

It is submitted by Appellants that in determining whether or not a Company is engaged in the general transportation of freight, the criterion should be regularity of service rather than volume and it is insisted that if the carrier is generally prepared at all times that this should be the criterion.

But it must be remembered that at one place in the Transportation Act of 1920 namely Sec. 209 Paragraph (a) the term "carrier" is defined and all street or interurban electric railways are excepted whose *principal* source of revenue is urban, suburban or interurban passenger traffic. Here it seems to us is a better criterion than the one named by Appellants.

THE FRANCHISE CONTRACT OF THE CITIES OF WELLSVILLE AND EAST LIVERPOOL, OHIO ARE VALID AND BINDING.

The Statute of the State of Ohio give these Cities the power to grant franchises and to regulate fares within the respective municipalities. Acting upon the power thus conferred the Cities of Wellsville and East Liverpool did enter into agreements regulating the fares within their respective borders.

The Supreme Court of Ohio has laid down, in clear and unmistakeable terms, the rule that where a franchise ordinance has been enacted by a municipality and accepted by a Traction Company or similar utility it constitutes a binding contract. It has held that such a contract cannot be changed or interfered with even

by the Public Utilities Commission of the State. And further where two or more companies merge, as has happened in this case, and the merged Companies continue to operate, the latter is obliged to conform to the terms, rates and regulations of the franchise so given to the original Company.

Interurban Railway and Terminal Company vs. The City of Cincinnatti, 93 Ohio State, 108.

Interurban Railway and Terminal Company vs. The Public Utilities Commission of Ohio, 98 Ohio State, 287.

This same principle has been upheld and reiterated by the Supreme Court of the United States in case of *The Columbus Ry. and Power Company vs. Columbus, Ohio*, 249 U. S., 399. In the case of *Home Telephone and Telegraph Company vs. The City of Los Angeles*, 211 U. S., 265 at Page 273, it is said; "It has been settled by this Court that the State may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract the governmental power of fixing and regulating the rates, and there are many other decisions of this court touching the same point."

See also *Detroit United Railway vs. Michigan*, 242 U. S., 238 at 248.

In this case the Utilities Commission has attempted to fix rates wholly within the limits of the City of East Liverpool. At Page 15 of the transcript the following language is used in the finding of the Commission, "Nothing herein is to be construed as authorizing any change in the fares as now in effect on the Traction Company's lines for transportation of passengers who begin and end their journey within the limits of any municipality." Yet in the face of this finding tariff I C C No. 8 attempts to establish a fare from and to the following points: State line to East Liverpool Terminal 3.8 miles 10 cts., State line to East Liverpool Diamond 4.1 miles 15 cts. See Transcript Page 10.

The original petition of the Traction Company in its action before the Commission which is fully set out in the record uses the following language: "From the Ohio-Pennsylvania State line which is also the line of the City of East Liverpool through the City of East Liverpool." (Transcript Page 27). Therefore it can readily be seen that this part of the I C C No. 8 Tariff where it refers to rides wholly within the City of East Liverpool are inconsistent with the general order cited above. The two rates above mentioned are not cases of attempting to regulate rates to and between other cities but seek to regulate rates wholly within the municipality of East Liverpool, Ohio.

THE CITY OF WELLSVILLE HAS INTEREST TO MAINTAIN BILL.

The District Court in its decision in the *Village of Hubbard* case (Tr., Page 38) says:

> "The Village of Hubbard was served by the Interstate Commerce Commission with a copy of its order of investigation appeared and was heard. Section 13, Interstate Commerce Act permits municipal corporations to apply by petition to the Interstate Commerce Commission to correct certain forbidden practices. It also confers full power and authority upon the commission to institute inquiries on its own motion or on the petition of any carrier into any rate or fare made or imposed by authority of any State. Obviously therefore if a franchise contract made by a municipality with a carrier is the basis of the inquiry, the municipality should be made a party and be given an opportunity to be heard, and if so, it has the same right as any other party in interest to seek redress in this Court against an erroneous or unlawful order of the commission."

It seems that the City is most vitally interested and may, the same as any other party in interest, seek redress for any property right involved.

It has been the practice to allow exchanges and representative associations to be heard before the commission and to be heard in Court against its orders.

The District Court further says:

> "No good reason is perceived why the plaintiff as a party to a franchise contract injuriously

affected, may not both here and before the Interstate Commerce Commission become a party to and maintain such suits as are necessary to assert and protect its contract rights."

NO UNJUST DISCRIMINATION SUCH AS WOULD WARRANT THE ACTION OF THE COMMISSION.

Not all discrimination will warrant interference of the Interstate Commerce Commission. If cases of discrimination are merely incidental or occur in a proportionately small number of cases, it will not warrant interference with local rates.

We wish to call attention to the first section of the syllabus in what is known as The Wisconsin Rate case, 257 U. S., 563, where the following language is used. "A showing that intrastate passenger fares work an undue discrimination against travelers in interstate commerce and against localities in typical instances numerous enough to justify a finding against a large class of fares is not sufficient evidence of discrimination against persons and localities, within the meaning of the transportation act of February 28th, 1920, Sec. 416, to justify a state wide order of the Intrastate Commerce Commission making a horizontal increase of all intrastate passenger fares to correspond with interstate rates, where it is clear that such an order will include many rates not within the class or the reason of the order; and a saving clause by which exceptions are permitted cannot give the order validity."

In that case in the opinion of the Chief Justice we find the following language, "The order in this case is much wider than the orders made in the proceedings following the Shreveport and Illinois Central cases. There as here the report of the commission showed discrimination against persons and localities at border points, and the orders were extended to include all rates or fares from all points in the state to border points. But this order is not so restricted. It includes fares to all interior points, although neither may be near the border, and the fares between them may not work a discrimination against the interstate traveler at all. Nothing in the proceeding cited justifies an order affecting all rates of a general description when it is clear that this would include many rates not within the proper class or the reason of the order. In such a case the saving clause by which exceptions are permitted cannot give the order validity."

The above Wisconsin rate cases have been much relied upon by the appellants, for other reasons than the ones cited above. We have merely cited the case and quoted extracts from the opinion as touching the question of rate discrimination. In this case the Commission, it seems, has attempted to establish rates between points wholly within the State of Ohio, and between towns where the rates have no relation whatever to interstate rates. Why should a thousand men pay an additional fare of ten cents from Wellsville, Ohio, to the East Liverpool Diamond simply because one man might beat the Company out of ten cents by re-shipping at the Diamond for points East across the State Line?

The District Court has spoken on this Wisconsin Rate Case as touching the question of jurisdiction. At page 46 of the Transcript the Court says:

> "The decision in the Wisconsin rate case rests heavily if not entirely upon new Section 15-a and new Section 20-a, both of which excluded street and interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight."

It seems that the Traction Company is resting its whole case on a showing of difference in rates and a need of additional revenue, and seeks to show that this is sufficient to establish discrimination of a character that is sufficient to clothe the Commission with jurisdiction and cause it to order an advance in rates. The real question is not a question of difference of rates, but whether by reason of different rates an unreasonable prejudice has been established against a party or a locality, that is a source of undue advantage to another party or locality.

We believe that the opinion of the lower Court as reported in the case of *The City of Wellsville vs. The United States*, 278 Federal, 769, should be affirmed.

HARRY BROKAW,
City Solicitor for
City of East Liverpool, Ohio.